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THE USE OF MEDICAL BOOKS IN THE EXAMINATION OF EXPERTS.

A medical expert must have an opinion of his own on the subject matter about which he is to testify. He may refresh his recollection by reference to standard authorities, but the judgment or opinion which he gives must be his own, and not merely that of another. It must be independent of the works which he has consulted or studied. If it appears that the expert is simply repeating what he has read in standard authorities, or been informed by other experts, he cannot qualify, unless it further appears that from his own knowledge or experience he is competent to form an independent opinion as to the correctness of what he has read or been informed.

In People v. Millard, 53 Michigan, 63. 76, Mr. Justice Campbell said:

"No one has any title to respect as an expert or has any right to give an opinion upon the stand, unless as his own opinion; and if he has not given the subject involved such careful and indiscriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only be safely formed or expressed by

persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application, made up their own minds. In doing so it is their business to resort to such aids, by reading and study, as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinion must be of very moderate value, and, whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect."

This rule is at times one of much practical importance in the trial of causes. In a celebrated recent poisoning case tried in the criminal courts of Philadelphia, one of the main points in controversy was whether arsenic was one of the constituent elements of the human body. The defence called a well-known physician who unqualifiedly testified that arsenic was one of the constituent elements of the human body. He fortified his opinion by reference to the writings of a distinguished German chemist, and passed unchallenged as an expert. Within a few months thereafter, in a similar case, this expert was again called by the defence for the same purpose. Upon cross-examination, he admitted that he based his opinion exclusively upon his reading of the writings of the German chemist, and that from his observation, experience and other readings, he was not able to form an independent judgment or opinion as to whether arsenic was one of the constituent elements of the human body. The trial Judge ruled that the expert was not competent to testify on the subject, and he ordered all testimony by the expert on the subject stricken out.

It is no doubt true that unless the subject inquired about is a new or novel one, an expert will seldom admit that he is incapable of forming an independent judgment or opinion on the subject.

While an expert must have an independent and definite opinion of his own, it is not, however, necessary that he should have formed such an opinion from practical experience or observation. In fact, it is not necessary that he should have had any practical experience in the subject inquired about; his reading of standard and recognized authorities alone is sufficient. Thus, in Hardiman v. Brown, 162 Massachusetts, 585, a practicing physician, of long experience, knew what the medical authorities said in regard to tumors, and he was permitted to testify as to whether in his opinion a tumor at the base of the brain was the exciting cause of the plaintiff's illness; though in his practice he had not been familiar with tumors on the brain.

To permit an expert without any practical experience or observation to qualify by reading alone, practically amounts, in most instances, to allowing the expert to repeat what he has read.

It is apparently now settled by the authorities beyond controversy that a standard medical work of recognized authority is not admissible for the purpose of establishing any medical fact; that is to say, the party having the burden of proving a certain medical fact cannot do so by offering in evidence a medical work stating the fact. An expert must be called to prove the fact, even though he merely repeats what is so much more authoritatively stated in a recognized treatise.

The rule is thus stated in Lawson on Expert and Opinion Evidence, Rule 34, page 202:

"Books of science and art are not admissible in evidence to prove the opinions contained therein."

In State v. O'Brien, 7 R. I., 336, the Court refused to permit Taylor's Medical Jurisprudence, a text-book of the highest authority, to be read to the jury in support of a medical fact necessary to be established.

So in Boehringer v. Richard's Medicine Co., 9 Texas Civil Appeals, 284, the Court refused to permit counsel to read from United States Medical Dispensatory for a similar purpose, yet any one familiar with the subject well knows that few could testify relative to most of the topics treated

in such a work without first referring to it, or a similar authority.

To allow an expert to testify from his reading of standard authorities alone, and yet at the same time to exclude such works as original evidence, seems to be a distinction without a difference. Any one familiar with the so-called medical expert well knows that the great majority of them specially qualify themselves before trial by reading the standard authorities. In fact, few of them who appear at the trial of causes are competent to form an independent opinion of their own. If they could not refer to the authorities, few of them would attempt to qualify as an expert. Their testimony is a substantial "rehash" of what they have read. Who for a moment would accept the opinion of the average expert in perference to the statements of such a standard authority as Taylor's Medical Jurisprudence, or other similar works? The great majority of subjects discussed in such works are undisputed and are generally recognized and accepted by the medical profession at large.

There is a clear distinction between the recognized and accepted facts of medicine, and the opinion of an expert on the special facts of a particular case. No medical work would be of any special assistance in itself in making clear the significance and bearing of the complicated facts of a particular case, and for such a purpose medical treatises should be excluded, not because the authors cannot be subjected to cross-examination, but because their works are of little value, and can throw but little light upon the subject. And further, should such works happen to contain an opinion on any particular state of facts, it might well be excluded on the ground that the opinion of the author on a particular case is mere hearsay. This reason, however, does not apply to well-recognized and accepted physical and chemical phenomena, such as the effect of arsenic on the human body, the effect of burns on the tissue and bones, etc. For the purpose of establishing such facts, the Court should permit proof of such facts by reference to authorities that are to the satisfaction of the Court proved to be standard and accepted authorities. The Courts, however, make no such distinction,

and exclude medical works for all purposes of proof whatever.

Much might be said in support of the suggestion that medical books should be admissible for the purpose of proving ordinary and well recognized medical facts. A medical expert is as a rule a partisan in the paid employment of the party calling him. He attempts to formulate an opinion favorable to his client. The opinion of such a person is much less weighty than that of recognized experts who devote their skill and experience to the ascertainment of truth for the instruction of the profession at large. The latter are generally recognized as non-partisan. None of the many reasons assigned by the courts for rejecting medical works as original evidence are entirely satisfactory from a practical point of view.

Mr. Wigmore, in his recent work on Evidence, Volume 3, page 2173, paragraph 1692, makes several weighty suggestions for the admission of such works.

"There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the *hearsay* exceptions, namely, that the declarant should have 'no motive to misrepresent.' They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a cause or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. . . . . The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, is precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other hearsay exceptions, namely,

the unwelcome probability of a detection and exposure of errors. Finally, the guarantees of accuracy, such as they are, at least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well known to repeat. It must be admitted that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants. It may be concluded, then, that there is in these cases a sufficient circumstantial guarantee of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust."

Not only have the courts excluded such works as original evidence, but they have carried the rule so far as to practically exclude them as evidence in any manner whatever.

Even an expert who admits that his opinion is based on reading alone, cannot substantiate his opinion by stating what the authorities say on the subject. It is difficult to perceive why the opinion of such an expert, without any original investigation or experiment, should be preferred to the very sources of information upon which he bases his opinion. The law is well settled, however, that he cannot state the views of the authors which he has consulted, neither can he be asked in examination-in-chief whether he concurs with the views of any particular author, or on cross-examination except to test his competency.

In fact, the rule has been extended so far by some courts that they will not permit an expert, who has not founded his opinion upon any particular authority, to be interrogated in cross-examination as to the views of standard and recognized authorities for the purpose of showing that his opinion is contrary to the recognized views of the profession. If, however, he states in examination-in-chief that he founds his opinion on any particular authority, these courts permit his cross-examination on the views of these

particular authorities, and these alone, for the purpose of showing that he has misunderstood or misquoted such authorities. Where any expert has stated an opinion, it is incomprehensible why it should not be shown in cross-examination that his views, however founded, are contrary to the accepted views of the profession, as set forth in the works of recognized authority.

The principal rules regulating the use of medical books in the examination of experts, thus briefly suggested, may be categorically stated as follows:

I.—AN EXPERT MUST HAVE AN OPINION OF HIS OWN.

Obvious as this rule is, no doubt many experts could be disqualified by skilful cross-examination by showing that their opinions are solely those of others, and that they cannot formulate an independent opinion of their own.

In Huffman v. Click, 77 North Carolina, 55, 57, it is said:

"The physician on examination in this case had the right to refresh his knowledge by referring to standard books in his profession, but his evidence must be his own, independent of the works."

In People v. Millard, 53 Michigan, 63, 76, Mr. Justice Campbell states the rule thus:

"No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion. . . . . But if they [experts] have only taken trouble enough to find, or suppose they find, that certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect."

In State v. Baldwin, 36 Kansas, 1, 17, it was said:

"A witness may refresh his recollections by reference to standard authorities, but the judgment or opinion which he gives must be his own, and not merely that of another."

II.—MAY QUALIFY BY READING WITHOUT PRACTICAL EXPERIENCE.

In State v. Wood, 53 New Hampshire, 484, the prisoner was on trial for abortion. F., a physician, gave his opinion as to the effect of a certain drug upon the womb. F's opinion was derived entirely from his reading. It was held that his opinion was admissible.

In Hardiman v. Brown, 162 Massachusetts, 585, a practicing physician, of long experience, knew what the medical authorities said in regard to tumors. The Court permitted him to testify as to whether, in his opinion, a tumor at the base of the brain was the exciting cause of the person's illness, though in his practice he had not been familiar with tumors on the brain.

In People v. Thacker, 108 Michigan, 652, a practicing physician, who was a graduate of a medical college, and had equipped himself by reading books and hearing lectures to have a definite opinion of his own, was permitted to testify as an expert on the subject of arsenical poisoning, though it was not shown he had had any experience in poisoning cases.

In Siebert v. People, 143 Illinois, 571, 579, on appeal it was claimed that the Court erred in allowing Dr. S. C. Gillett and Dr. C. L. Smith to testify as experts on the subject of arsenical poisoning. Dr Gillett, as to his qualifications as an expert, testified that his profession was that of physician and surgeon; that he was a graduate of Rush Medical College of Chicago; that he had been a practicing physician in Aurora for thirty-four years, and that he was a licensed physician under the laws of Illinois. An hypothetical question was then put to him by the prosecution setting forth the symptoms of the deceased, and he was asked from what cause in his opinion the deceased came to his death. This was objected to by both of the defendants, on the ground that the witness did not qualify as an expert, which objection was overruled, the defendants excepting. The witness then testified, in substance, "If I find arsenic, then I should expect he died from the effects of arsenic." In overruling the exception, the Court said:

"It will be observed that the two witnesses were both graduates of medical colleges and that they were engaged in general practice and had been for a number of years. Whether they have ever had any experience in a case of poisoning in their practice does not appear from their examination. It is insisted that it devolved on the prosecution to show that the witnesses had, in their practice, a case of arsenical poisoning, before they could testify. . . . Without, however, extending the discussion of the question any further, we are inclined to hold that the opinions of the witnesses, founded on their practice, were competent evidence. What weight, however, should be given to the evidence was a question for the jury."

III.—MEDICAL BOOKS ARE NOT ADMISSIBLE IN EVIDENCE THOUGH STANDARD AUTHORITIES.

"Books of science and art are not admissible in evidence to prove the opinions contained therein."—Lawson on Expert and Opinion Evidence, Rule 34, Page 202.

In Huffman v. Click, 77 North Carolina, 55, the Court excluded a book on medical jurisprudence in a case in which the existence of paralysis, caused by hysteria, was at issue. where the book was offered to show that the symptoms testified to were common in cases of hysteria, and that this was one of the existing causes of paralysis.

In Tucker v. Donald, 60 Mississippi, 460, it was held that extracts from Copeland's Medical Dictionary, referring to paralysis, were not admissible in evidence.

In State v. O'Brien, 7 R. I., 336, upon the trial of a murder case, the Court refused to permit Taylor's Medical Jurisprudence, a text-book of recognized authority, to be read to the jury as evidence, and the Supreme Court of that State, in approving of this ruling of the Presiding Judge, said:

"Scientific men are permitted to give their opinion as experts because under oath, but the books which they write, because not under oath, are excluded."

In Boehringer v. Richard's Medicine Company, 9 Texas,

Civil Appeals, 284, it was held that the United States Medical Dispensatory was not admissible in evidence to establish a fact therein contained.

In Collier v. Simpson, 5 Carrington & Payne, 73, it was held that medical books, though stated by medical witnesses to be medical authorities, were not admissible in evidence as to the prescribing of medicines, to show that certain doses were sanctioned.

In Fowler v. Lewis, 25 Texas, 380, it was held that a treatise on horses by "Youatt," after being established to be an authority on the subject, could not be read to the jury.

IV.—AN EXPERT MAY REFER GENERALLY TO THE AUTHORS HE HAS READ, BUT CANNOT GIVE THE CONTENTS OF THEIR BOOKS.

In State v. Baldwin, 36 Kansas, 1, 16, an objection was made to the testimony of Dr. Campbell, who was a practicing physician of more than twelve years' experience. He testified as an expert, and, after showing some of the effects of chloroform upon the human system, was asked, "How is it regarded by medical authorities upon the subject, and by medical men who are authority upon that subject?" He answered:

"It is regarded by writers on that subject, and by all men who have used it to any great extent, and by all universally, so far as I know, as a very dangerous agent, and an agent, if pushed beyond a certain point, which will produce death; that is, in danger always of producing death. To be sure a great many men have used it a great deal, and have had no bad results from it."

In reviewing the ruling of the lower Court, it was said:

"Although the courts are not uniform in their holdings upon the admissibility in evidence of medical and scientific books, the great weight of authority is that they cannot be admitted to prove the declarations or opinions which they contain; this upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination. But

while the books are not admissible, an expert witness is not confined wholly to his personal experience in the treatment of men, but his opinions formed in part by the reading of treatises prepared by persons of acknowledged ability may be given in evidence. So also may a witness refresh his recollection by reference to standard authorities; but the judgment or opinion which he gives must be his own and not merely that of the author. In an early case, ... The Chief Justice responded:

"'I do not think the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford his judgment and the ground of it, which may be in some degree founded upon books as a part of his general knowledge.'

"The present case falls within this authority; Dr. Campbell is shown to be a man of large experience and extended reading in his profession, who had given his own opinion, and it was not improper for him to state that the opinion was formed from the study of books and men, and also that all the writers and authorities on the subject so far as he knew supported him in his opinion."

In Boyle v. State, 57 Wis., 472, 478, it was said:

"It seems to us that the Court erred in permitting Dr. Cody to testify as to what was said in standard medical works upon the subject of strangulation, and what effects would be produced upon the body of the deceased when death resulted from such cause. . . . . If it be urged that the works of medical writers were not in fact offered in evidence, but that the witness was called upon to testify as to what certain medical works contained on the subject under investigation, it cannot help the state, as in such case the attempt is to put in evidence what is stated by a medical authority upon the subject of inquiry, without producing the book, and depending upon the memory of the witness. Certainly if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for their correctness. . . . . The effect of the evidence given under objection by Dr. Cody was to put before the jury as evidence

what the medical works laid down as evidences of strangulation. If this may be done indirectly by the oral testimony of the person who has read the medical works, it would certainly be a much safer rule to permit the books themselves to be read to the jury as being better evidence of the facts."

V.—MEDICAL BOOKS CANNOT BE READ IN CHIEF TO THE EXPERT AND ASKED WHETHER HE CONCURS WITH THEM.

This rule is more often violated than any of the others. It is most common to see counsel read from a medical work and then ask his own witness whether he concurs with the author. Frequently no objection is raised to this practice.

In Pahl v. Troy City Railway Co., 81 N. Y. Supp., 46, counsel was not permitted to read from a medical book a statement as to the symptoms of a certain disease, and then ask the witness if he subscribed thereto. The Court said:

"The plaintiff was thus enabled to bring to the knowledge of the jury the statement, not under oath, of Dr. Charles L. Dana, whose writings on the subject of nervous diseases the witness testified were considered authoritative by the medical profession, and without the defendant having an opportunity to cross-examine Dr. Dana as to the facts and symptoms upon which he based his opinion, and as to whether perchance his views had undergone a change since the article was written. The fact that the article read was part of a medical book, doubtless, gave the statement therein contained much more weight with the jury than it would have received simply as part of the oral testimony of a local physician."

In Comm. v. Sturtivant, 117 Mass., 122, a witness, called by the defendant as an expert on the subject of blood-stains, having said that, in his opinion, it was impossible to determine, with certainty, in the case of a stain that had been upon clothing seven days, whether it was human blood, was asked whether he coincided with the views of Dr. Taylor, as expressed in Taylor's Medical Jurisprudence,

which book was passed to the witness. The counsel then proposed that a certain paragraph upon that point from the book, with which the witness concurred in opinion, should be read to the jury by the witness; but the Court excluded it. (See page 130).

On appeal, this ruling was affirmed, the Court saying on page 139:

"The refusal to allow a witness to read extracts from a book on medical jurisprudence was in accordance with a well settled practice in this Commonwealth."

In Mason v. Hicks, 60 Hun., 46, 56, the petitioner's counsel at the trial was permitted to read from medical books what different authors had written in relation to the condition of a patient when the arm regained power quicker and better than the leg, and then asked the witness the following question: "Assuming the facts stated there, what do you think as to the proposition that that is a bad indication?" To which the witness answered: "It is an unfavorable condition as compared to the reverse when the limb mends first and the arm last; the condition is more favorable, more favorable as to the condition of the brain, and shows a less degree of disorganization of the brain." On appeal the Court said:

"This evidence was objected to, and the counsel for the appellant repeatedly asked the court to strike out what was read from the books, which was denied. We think this was error. It was, in effect, asking the witness to answer a question not based upon any hypothesis founded upon facts proved in the case, but to answer a question based upon the hypothesis that the statements read were true. The effect of these rulings was to bring before the jury the unverified statements of the authors of the books read, and would tend to improperly influence a jury in the determination of the question before them. Medical books cannot be introduced in evidence, nor can an expert witness be permitted to testify to statements made therein; and it is equally improper to permit the reading of such books to the jury by counsel."

In Foggett v. Fisher, 48 N. Y. Supp., 741, counsel,

for the purpose of proving the extent and effect of the plaintiff's injury, called a medical witness who having given his view of the nature of the injury to the plaintiff. testified that, in his opinion, it was a progressive injury. Then he proceeded to state that he knew Prof. Gross' work, and that it was recognized as authority. Thereupon, in answer to questions put to him, the witness having stated that Prof. Gross' work contained a statement as to the probable effect of injuries to nerves, he pointed out the statement referred to. The plaintiff's counsel was then permitted to read in evidence from the book of such professor the following: "Severe effects often follow contusion of the nerves, the parts to which they are distributed becoming numb, cold, withered, more or less painful, and ultimately, almost entirely useless;" and the further clause from the same book that "effects of this kind sometimes succeed an accident of apparently the most trifling character." The defendant's counsel objected to all this evidence when offered, and excepted to the rulings for its reception.

The Court on appeal said:

"The question of damages was necessarily an important one, and it cannot be seen that the defendant may not have been prejudiced by the reception as evidence of those paragraphs from the book of Prof. Gross. Our attention is called to no rule of evidence which could permit the introduction of that evidence."

VI.—CAN THE CONTENTS OF A MEDICAL BOOK BE GOT IN EVIDENCE UNDER GUISE OF CROSS-EXAMINATION?

There are three views on this subject.

(a) A medical expert may be cross-examined generally as to the views of standard medical works, for the purpose of ascertaining his knowledge and competency, irrespective of the fact that he may not have referred to them in his examination-in-chief, or relied upon them in forming his opinion.

(b) A medical expert cannot be cross-examined generally as to the contents of standard medical works for the sole

purpose of ascertaining his general knowledge and competency.

(c) While an expert cannot be cross-examined generally as to the contents of standard medical works for the purpose of ascertaining his general knowledge and competency, yet if he relies upon any particular authority, he may be cross-examined as to that authority, in order to show that he misunderstood or misquoted the authority.

The authorities in support of these three views are as follows, and will be found set forth under the heads as above stated:

The first view is best stated in the case of Egan v. Dry Dock &c. R. R. Co., 12 Appellate Division (N. Y.), 556. In that case the defendant put upon the stand, as an expert Dr. Charles E. Emery, who gave material evidence upon the various points in the case. During his cross-examination, his attention was called to certain books on the design, construction and operation of boilers,—one written by Charles A. Smith and another by Prof. Thurston, who was one of the plaintiff's experts,—as to which he answered that he knew of those books, and that they were standard works on engineering subjects. Dr. Emery had testified that, in his judgment, the hydrostatic test was very effective; and that the hammer test was, in his judgment, inefficient and insufficient. In view of that testimony certain passages from the two books above mentioned, as to the efficiency of the hammer test, were read to him, and he was asked whether or not he agreed with what was stated in those passages. This testimony was objected to as immaterial, and, the objection having been overruled, an exception was taken.

It will be observed that in this case the witness was under cross-examination and the purpose of the question was to ascertain whether he concurred with the views of the authors of standard treatises whose conclusions were at variance with those of the witness. The object of counsel was to discredit the witness. Under rule five this course could not have been pursued in the examination of the expert in chief.

In reversing the Court said: "We are quite clear that

this evidence was entirely competent. There is no doubt that the contents of scientific books cannot be read to a jury for the purpose of proving the facts or establishing the deductions stated in them. The reasons for this rule are so thoroughly stated in the text-books that it is not here necessary to comment upon it. But the contents of the books which are referred to in this particular case did not come within that rule. Whenever a man holds himself out as an expert witness and undertakes to give his opinion upon any scientific matter, it is not only proper to examine him as to the grounds of his opinion, but his qualifications as an expert may be tested upon cross-examination in any way which will enable the jury, who are to pass upon the weight to be given to his testimony, to judge intelligently about it. For that purpose, it is perfectly proper to ask whether or not the opinion he has expressed agrees with the opinion of other people who are conceded to be learned upon the same subject, because, if an expert witness admitted that the opinion which he expressed was contrary to the opinion which was held upon the same subject by other men who were acquainted with the same science, it might, unless the reasons which he gave for his opinion were satisfactory, tend strongly to detract from the weight which that opinion would otherwise receive. For the same reason, if the witness admitted the text writers of acknowledged authority and had expressed opinions contrary to the one which he gave in regard to the matter under examination, that might go to detract from the weight to be given to such testimony. Therefore, it has been the custom, in this State at least, to call the attention of an expert witness, upon cross-examination, to books upon the subject, and ask whether or not authors whom he admitted to be good authority had not expressed opinions different from that which was given by him upon the stand. The reference to books in such cases is not made for the purpose of making the statements in the books evidence before the jury, but solely for the purpose of ascertaining the weight to be given to the testimony of the witness. The extent to which such examination may go is very largely in the discretion of the court. It has been

usual to permit questions of that kind to be asked in this State, and we are not aware of any well-founded objection to it. For this reason, we think that the objection to this kind of testimony was properly overruled."

In Hutchinson v. State, 19 Neb., 262, counsel for the defendant objected to certain questions propounded to Dr. A. L. Root by the State in cross-examination. The prosecutrix testified that the intercourse which resulted in the birth of the child consisted of a single act of copulation had by force and against her consent, and at the period of the menstrual flow, and that the time of gestation was extended.

The defendant sought to show by Dr. A. L. Root, by hypothetical questions as well as by his own experience, that the theory of the prosecution was wrong; that pregnancy would not probably result from a single act of intercourse under the circumstances named, that being the first and only such act of the prosecutrix. Upon the cross-examination, the following occurred:

"Q. I will ask you to state, doctor, if the testimony that you have given in reference to a woman becoming pregnant in case of rape or when sexual intercourse is had by force, if the testimony which you have given is not based upon medical authorities rather than upon your own experience.

"A. Yes, the testimony is all based upon medical authorities.

"Q. I will ask you to state what the medical authorities hold upon that question now.

"Objected to as incompetent, immaterial, and irrelevant, and not proper cross-examination. Overruled and exception."

In sustaining the Court below, it was said:

"Aside from the fact that the testimony was given in chief upon the teachings of the medical authorities to a great extent, we think the proper and legitimate scope of cross-examination would permit the interrogatory. If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper, for the purpose of ascertaining his means of knowledge by a

reference to the teachings of the text-books of his profession and the scientific works from which he had testified. Again, we cannot conceive that it would be possible by any rule of evidence to base the testimony in chief of the witness upon his experience in obstetrics. For instance, the normal period of gestation, the probability of conception in the first act of intercourse, the length of the period of gestation in the case of the first as compared with subsequent children, the number of days that ill health caused by uterine disorders would shorten the period of gestation, if at all, and many other prominent elements in the case presented by the defence, would naturally and inevitably require the witness to go outside of the domain of experience as an obstetrician, and it seems to us that he very properly and truthfully answered that this testimony was based upon medical authorities. For the purpose, therefore, of testing his recollection as well as his knowledge, it was proper to interrogate him as to the teachings of those authorities, and in case his testimony was incorrect, to confront him with them in order that he might be corrected and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the testimony was inadmissible because 'the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities.' As we have shown, the testimony entered the domain of science, the ground upon which the objection is founded appeals most strongly to the mind of the writer as cogent reasons why the cross-examination was proper."

In Hess v. Lowry, 122 Ind., 225, the Court said:

"In the cross-examination of a medical expert, the witness was asked whether certain statements were not made by certain writers on surgery, the statement referred to being read from a book held by counsel as part of the question. It is recognized as a proper method of cross-examination in order to test the learning of a witness who testifies as an expert to refer to books of approved authority upon the subjects under investigation."

Were it not for the authorities next to be considered, it

would be difficult to perceive how any objection could be raised to this method of ascertaining the competency and qualification of a medical expert. An expert may give any opinion he sees fit to announce, and if he is skilful enough to avoid reference to any authorities in support of his opinion, he could prevent a successful attack upon his conclusions by way of cross-examination, if counsel were prevented from interrogating him as to the views of standard and recognized authorities. Medical subjects are peculiarly within the province of expert opinion, and if an expert could not be cross-examined in order to show the fallacy of his opinion by reference to standard authorities, the opinion of a mere "quack" or "fraud" might have more weight with a jury than the opinion of a really skilled and experienced physician.

Reasonable as is the rule which permits cross-examination on the contents of standard authorities, it has its limits, in that it cannot be resorted to for the sole purpose of presenting to a jury the views of medical writers favorable to the side of the cross-examiner. Should the Court be satisfied that the object of counsel in cross-examination is not to contest the skill and competency of the expert, but merely to get before the jury the views of authors favorable to his theory of the case, then it would be proper to exclude such a method of cross-examination.

This limitation of the rule is well expressed in the case of Fisher v. Southern Pacific R. R. Co., 89 California, 399:

"'While it is to be regretted if in the proper exercise of the right of cross-examination, it shall appear that certain medical writers of a repute differ from the witness, and so a party will get the benefit of unsworn testimony, still this evil, unavoidable in the nature of things, is, in my opinion, not at all commensurate with that which would deprive the party in such a case of the best touch-stone known to legal science, by which to estimate the value of testimony.

"And if, on general principles, such questions are legitimate on cross-examination, I do not see how a party can be deprived of his right because such evil consequences may follow.

"But since consequences are likely to follow which admittedly should be avoided if possible, such examination should be strictly limited to this one purpose, for which only it can be permitted.

"I think no fair-minded person can closely study this record without being convinced that the evidence was not put in with any such purpose. No doubt counsel offered it under the impression that it was justified as inconsistent with opinions which the witness had claimed were sustained by medical authorities. I have shown that the claim cannot be sustained on that ground. In fact, although the witness took issue with some statements read, they cannot fairly be said to contradict his evidence in any respect.

"They were evidently intended as evidence for the plaintiff, to sustain his theory of the case, and not to affect the competency of the witness or the value of his testimony."

(b)

Cannot be cross-examined generally on medical books to test competency.

In Davis v. State of Maryland, 38 Md., 15, an exception was taken at the trial to the cross-examination of a medical expert. It appeared that no autopsy of the body was made; the examination being confined to an external examination of the wounds. The expert was asked if there was any medical or scientific term, distinguishing the examination thus made from autopsy. To which he answered, "Some books on medical jurisprudence called it an examination of the body." In answer to the further question, as to what book, witness replied, "Taylor;" whereupon the counsel for the prisoner handed the book to the witness, and asked him to turn to that part of it in which such an examination was so designated.

"If the purpose was to test the medical knowledge of the witness," the Court said, "the mode proposed certainly was not a very satisfactory way to do so. The medical knowledge of a witness, who is competent to testify as an expert, it is but fair to presume is founded upon authorities so differing in value, and upon such various degrees of

practice and experience, that it is doubtful, to say the least of it, whether the accuracy of his recollection as to a technical term used by a writer, can be said to test in any manner his general knowledge and experience. Be that, however, as it may, we are of opinion that the book could not be handed to the witness even for such a purpose. Courts are not presumed to be familiar with the principles, or the terms used by medical authors, and when questions arise, necessarily involving their application, they must be proved as facts are proved, by witnesses competent to testify in regard thereto. Medical books are not admissible in evidence, either for the purpose of sustaining or contradicting the opinion of a witness."

In City of Bloomington v. Schrock, 110 Ill., 219, Dr. Luce was called, and examined as a witness on behalf of defendant, as an expert, and gave evidence tending to prove that the plaintiff was guilty of negligence in the respect contended by defendant. He quoted from and made reference to no book; but upon his cross-examination, counsel for plaintiff inquired of him whether he was acquainted with "Playfair," and "Bedford," (treatises on midwifery), and upon his responding in the affirmative, and that they were standard authorities on questions of this character, counsel proceeded to read at length from each of these authors, consecutively, and then inquired of the witness whether he agreed with the authors as to the parts so read. This was objected to by the counsel for appellant, but allowed by the Court, and the witness was required to make answer. This was held to be error.

"The weight of currrent authority," it was said, "is decidedly against the admission of scientific books in evidence before a jury, although in some States they are admissible. . . . . Where, however, an expert assumes to base his opinion upon the work of a particular author, that work may be read in evidence to contradict him. . . . .

"Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where

a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory."

In Forest City Ins. Co. v. Morgan, 22 Appellate Court (Ill.) 198, the Court said, on page 202:

"It was . . . . error to permit counsel for appellee, over the objections of appellant, to read in the presence of the jury to the witnesses Thompson and Ross, on their cross-examinations, extracts from the treatises of Wilson, Barr and Schook on steam boilers. The witnesses were testifying as experts, but it was immaterial, under the circumstances of the examination, whether they were properly experts or not; in either event, the theories in the above mentioned scientific works were incompetent testimony."

In Marshall v. Brown, 50 Michigan, 148, on the cross-examination of Dr. Wood, a witness for the defendant, he was asked if he was acquainted with a certain book. He replied that he had heard of it but had not read it. He was then asked whether it was considered good authority, and he said it was. He was then requested to read a certain paragraph during the recess of the court. When the court convened again, he was recalled and counsel reading from the book the paragraph to which his attention had been called, asked him whether there was a case reported of taking sulphite of zinc, followed by vomiting, purging, and death. This was held improper cross-examination. It was said:

"As this was what the paragraph stated, the evident purpose of the question was to put the passage from the book in this indirect manner before the jury, instead of reading from it directly. The witness demurred to this method of examination, but was required to answer and did so.

"The case differs from Pinney v. Cahill, 48 Mich., 584, where a medical book was produced to contradict a witness who professed to be testifying from it.

"The verdict must be set aside."

In Hall v. Murdock, 114 Michigan, 233, the injury to the plaintiff was vigorously contested by the defendants, and they introduced expert testimony tending to show that the injury resulted from other causes. Medical experts were placed upon the stand, who gave their experience in such diseases, and their opinions that plaintiff's condition was not the result of the injury. Upon cross-examining these witnesses counsel for the plaintiff called their attention to certain medical works, and, under objection and exception, read quite extensively to the jury.

On appeal the Court stated the rule thus: "This was error, and we cannot hold that it was not prejudicial. The only circumstances under which medical books can be read in evidence is where the witness has based his opinions upon them, and has referred to them as authority. . . . . This rule cannot be evaded on cross-examination."

(c)

May be cross-examined on books relied on.

In Pinney v. Cahill, 48 Michigan, 584 the plaintiff produced a witness who swore that he was a veterinary surgeon of twenty-five years' standing, and his opinion as an expert being called for, he swore that in his opinion the horse died from being overfed when too hot, which would produce colic. On cross-examination he said that colic was caused by over-driving and feeding when the animal is too warm; that all works of good authority spoke of it and that the "Modern Horse Doctor," by Dr. Dodd, was a work of that kind.

The defendant then offered to show from this work of Dr. Dodd, where the author treats of colic. The plaintiff objected to its introduction, but the Court admitted it. This ruling was sustained for the following reasons:

"The rule is acknowledged in this State that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was

not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it, and among others with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness-stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement by referring his learning to the books before mentioned and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and to enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of."

In Huffman v. Click, 77 N. C., 55, the Court said, on page 58:

"The medical expert himself may cite standard authors in his profession as sustaining his views, and they may be put in evidence by the other side to discredit him."

In City of Ripon v. Bittel, 30 Wis., 614, the Court said, on page 619:

"The record does not inform us what the purpose or object of the treatise was. Counsel suggest that it may have been to expose or discredit the medical witnesses examined as experts, who, founding their opinions upon the same treatises, recognized as standard authorities, had testified that the books laid down such and such particular propositions or theories, or sustained such and such particular conclusions, when in truth and in fact, the books did not do so, and the witness was mistaken. Counsel asks if under such circumstances the books would not be admissible as in the nature of impeaching evidence, or to show that the experts were in error. We cannot see that the admission would be improper, and so must overrule the objection."

No effort has been made to exhaust the authorities, but

it is believed that the cases to which reference has been made are representative, and present the most satisfactory reasons in support of the several rules.

These rules, simple and easily understood as they are, are most frequently overlooked at the trial; in fact, it is not uncommon to see the most elementary of them ignored in the examination of medical experts, whether in actions for personal injuries, or the ordinary prosecution for rape and abortion.

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